SUR LA RECEVABILITÉ

Application No. 23727/94
by Gerhard OBERSCHLICK
against Austria

The European Commission of Human Rights sitting in private on 16 May 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 22 February 1994 by Gerhard Oberschlick against Austria and registered on 21 March 1994 under file No. 23727/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as they have been submitted by the applicant, may be summarised as follows.

The applicant, an Austrian national born in 1942 and residing in Vienna, is a journalist by profession and editor of the periodical "Forum". Since 1986 the applicant is also the owner of "Forum".

On 23 May 1991 the European Court of Human Rights delivered its

judgment in a case which had been introduced by the applicant (Eur. Court H.R., Oberschlick judgment, Series A no. 204). In this judgment the European Court of Human Rights found a violation of Article 10 of the Convention as regards the applicant's conviction for defamation for having published in issue No. 352 of 20 April 1983 of the periodical "Forum" a criminal information he had laid against a politician. The European Court of Human Rights also found a violation of Article 6 para. 1 of the Convention in that three of the judges of the Court of Appeal who decided on the applicant's appeal had already decided on an earlier appeal of the applicant in the same proceedings.

On 6 November 1991 the applicant applied under Section 353 para. 2 of the Code of Criminal Procedure to the Vienna Regional Court (Landesgericht) for re-opening (Wiederaufnahmeantrag) of the criminal proceedings which had led to his conviction for defamation.

Section 353 para. 2 of the Code of Criminal Procedure provides that a convicted person may request the re-opening of the criminal proceedings, if he furnishes new facts or new evidence, which, alone or in connection with the previously taken evidence, are capable of leading to his acquittal or his conviction for a less severely punished offence. The applicant submitted that the Oberschlick judgment of the European Court of Human Rights was a new fact justifying the re-opening of the proceedings.

On 17 September 1992 the Supreme Court (Oberster Gerichtshof) decided upon a plea of nullity for the preservation of the law (Nichtigkeitsbeschwerde zur Wahrung des Gesetzes) introduced by the Attorney General's Office (Generalprokuratur) against the judgment of the Vienna Regional Court of 11 May 1984 and the appeal judgment of the Vienna Court of Appeal (Oberlandesgericht) of 17 December 1984, i.e. the domestic courts' judgments which led to the Oberschlick judgment of the European Court of Human Rights. The Supreme Court held that the Court of Appeal's judgment of 17 December 1984 violated provisions of the Code of Criminal Procedure and Article 6 para. 1 of the Convention as regards the composition of the Court of Appeal. The Supreme Court dismissed the remainder of the plea of nullity and did not quash the applicant's conviction.

On 13 April 1993 the applicant complained to the Court of Appeal about the Regional Court's inactivity in dealing with his request of 6 November 1991.

On 20 April 1993 the Regional Court dismissed the applicant's request for re-opening of the criminal proceedings. It found that the judgment of the European Court of Human Rights was neither a new fact nor new evidence within the meaning of Section 353 para. 2 of the Code of Criminal Procedure, but a diverging legal qualification of the same facts as regards the offence of defamation.

On 12 May 1993 the applicant appealed. He submitted that the Regional Court's interpretation of the relevant provisions of the Code of Criminal Procedure violated Articles 6, 10, 52 and 53 of the Convention. He further asked the Court of Appeal to request the Constitutional Court (Verfassungsgerichtshof) to institute proceedings for the review of the constitutionality of Section 353 para. 2 of the Code of Criminal Procedure.

On 7 July 1993 the Court of Appeal dismissed the applicant's appeal. It found that the diverging legal opinion of the European Court of Human Rights as to Article 10 of the Convention did not constitute as such a reason for re-opening of the criminal proceedings under Section 353 para. 2 of the Code of Criminal Procedure. Furthermore, the possibility of a plea of nullity for the preservation of the law constituted a sufficient means of redress.

COMPLAINTS

1. The applicant complains that Austria failed to implement the Oberschlick judgment of the European Court of Human Rights. He submits that because of the refusal of his request for the re-opening of the criminal proceedings he had no possibility to request the quashing of the domestic courts' judgments which the European Court of Human Rights in its Oberschlick judgment found to be in violation of Article 10 of the Convention and to obtain the lifting of the seizure of the relevant issue of "Forum". He invokes Articles 10, 13 and 53 of the Convention and Article 1 of Protocol No. 1.

2. He complains under Article 6 para. 1 of the Convention that the Regional Court failed to decide upon his request for re-opening of the criminal proceedings within a reasonable time as required by this provision.

3. He complains about discrimination prohibited by the Convention in that the Supreme Court in its decision of 17 September 1992, which concerned the applicant's case, rejected a plea of nullity for the preservation of the law, while in its decision of 18 September 1992, concerning another case, it allowed such a plea of nullity and followed the reasoning of the European Court of Human Rights in the Oberschlick judgment. He invokes Article 14 of the Convention.

THE LAW

1. The applicant complains that Austria failed to implement the Oberschlick judgment of the European Court of Human Rights. He submits that because of the refusal of his request for the re-opening of the criminal proceedings he had no possibility to request the quashing of the domestic courts' judgments which the European Court of Human Rights in its Oberschlick judgment found to be in violation of Article 10 (Art. 10) of the Convention and to obtain the lifting of the seizure of the relevant issue of "Forum". He invokes Articles 10, 13 and 53 (Art. 10, 13, 53) of the Convention and Article 1 of Protocol No. 1 (P1-1).

The Commission notes that the applicant raised similar complaints about the alleged failure of Austria to implement the Oberschlick judgment of the European Court of Human Rights in previous applications (Nos. 19255/92 and 21655/93) lodged by him. The Commission, however, need not determine whether it is barred by virtue of Article 27 para. 1 (b) (Art. 27-1-b) of the Convention from dealing with the present complaint since it is, in any event, inadmissible for the following reasons.

The Commission recalls that it has no competence to examine whether the High Contracting Party has complied with its obligation under a judgment given by the European Court of Human Rights. The Commission cannot assume any function in relation to the supervision of the execution of the Court's judgment, this supervision being entrusted under Article 54 (Art. 54) of the Convention to the Committee of Ministers (see No. 10243/83, Dec. 6.3.85, D.R. 41 p. 123 at 129; No. 19438/92, Dec. 29.3.93, to be published in D.R.).

The Commission notes that the Committee of Ministers has discharged its supervisory functions in relation to the above-mentioned judgment by the adoption of its Resolution DH (93) 60 of 14 December 1993.

It follows that this part of the application must be rejected as incompatible ratione materiae with the provisions of the Convention in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant complains under Article 6 para. 1 (Art. 6-1) of the Convention that the Regional Court failed to decide upon his request for re-opening of the criminal proceedings within a reasonable time as

required by this provision.

The Commission recalls that Article 6 (Art. 6) of the Convention does not apply to proceedings for the re-opening of criminal proceedings given that someone who applies for his case to be reopened and whose sentence has become final is not "charged with a criminal offence" within the meaning of the said Article (No. 7761/77, Dec. 8.5.78, D.R. 14 p. 171).

The Commission finds that the proceedings following the applicant's request of 6 November 1991 for the re-opening of the criminal proceedings against him, did not involve a determination of any criminal charge against him. It follows that Article 6 (Art. 6) of the Convention does not apply to the proceedings in question.

Consequently, this part of the application must be rejected as incompatible ratione materiae with the provisions of the Convention in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

3. The applicant further complains about discrimination prohibited by Article 14 (Art. 14) of the Convention in that the Supreme Court in its decision of 17 September 1992, which concerned the applicant's case, rejected a plea of nullity for the preservation of the law, while in its decision of 18 September 1992, concerning another case, it allowed such a plea of nullity.

However, under Article 26 (Art. 26) of the Convention the Commission may only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The Commission observes that the Supreme Court on 17 September 1992 partially dismissed the plea of nullity for the preservation of the law lodged by the Attorney General's Office in the applicant's case, whereas the present application was introduced on 22 February 1994.

It follows that in this respect the applicant did not comply with the time-limit stipulated by Article 26 (Art. 26) of the Convention. This part of the application must, therefore, be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission by a majority

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)